Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-222

DONALD C. TAYLOR, ACTING DIRECTOR,
RHODE ISLAND DEPARTMENT OF CORRECTIONS,
and JAMES MULLEN, WARDEN,
ADULT CORRECTIONAL INSTITUTIONS,
PETITIONERS,

v.

MICHAEL ROBERTS, individually and
on behalf of all others similarly situated,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JULIUS C. MICHAELSON
Attorney General
RONALD A. DWIGHT
Special Assistant Attorney General
250 Benefit Street
Providence, Rhode Island 02903
(401) 831-6850

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Attorney General for the State of Rhode Island on behalf of Donald C. Taylor, Acting Director of the Rhode Island Department of Corrections, and James Mullen, Warden of the Adult Correctional Institutions, Cranston, Rhode Island, petitions for a writ of certiorari before final judgment to the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the United States District Court for the District of Rhode Island issued February 25, 1975, (App. A, *infra*) is reported at 390 F. Supp. 705 (D.R.I. 1975).

Jurisdiction

The judgment of the United States District Court for the District of Rhode Island was entered on April 1, 1975. (App. B) The jurisdiction of this Court to review the instant case, which is pending in the United States Court of Appeals for the First Circuit is invoked under 28 U.S.C. § 1254.

Constitutional Provisions

United States Constitution, Articles of Amendment 5, 6 and 14.

Statement of the Case

This is a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons committed as adults to the custody and conduct of the Director of the Rhode Island Department of Corrections challenging certain disciplinary policies and procedures whereby prisoners who are charged with an institutional offense, which may also be a crime, are punished following a hearing during which the inmate has no right to counsel, any invocation of silence may be used against him, and there is no assurance that any statements he makes therein will not be used to incriminate him in a criminal proceeding. The named plaintiffs below, Michael Roberts and Robert Flint, had been criminally charged by Rhode Island State

Police, arraigned on said charges and entered not guilty pleas at arraignments in the Rhode Island District Courts. Simultaneously, they were charged with intra-prison disciplinary offenses for the same alleged misconduct which had resulted in the criminal complaints. Prior to prison disciplinary hearings on said infractions, and in accordance with institutioned disciplinary rules, Flint and Roberts were each advised that "although statements he makes in his defense at a disciplinary hearing are probably not admissable for affirmative use by the prosecutional trial, he may wish to consult an attorney to determine what action to take." Flint and Roberts were further advised prior to their disciplinary hearings that in accordance with institutional policy they did not have the right to the presence of an attorney before the disciplinary board; and at the outset of said hearings, the board confirmed that it could not guarantee "use immunity" for any testimony they might give. Through a lay representative, Flint and Roberts each announced to the disciplinary board that in the absence of "use immunity" they would limit their defense to cross-examination. They also stated that while they would have preferred to testify in their own defenses, they declined to do so because of the risks of self-incrimination. Both inmates were found guilty by the disciplinary board and as a result were penalized through loss of good time and sentenced to placement in punitive segregation.

Following a trial on the merits, and in accordance with its opinion of February 25, 1975, on April 1, 1975, the District Court entered a judgment declaring that insofar as the named plaintiffs below and members of their class had been denied the assistance of counsel, a grant of use and derivative use immunity, and had the invocation of the privilege against self-incrimination considered as a factor relevant to the determination of charges at a dis-

ciplinary proceeding which may also constitute a crime, said proceedings violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The District Court also held that under such circumstances, plaintiffs and members of their class were entitled to "use and derivative use immunity," and enjoined petitioners from punishing inmates charged with infractions which are also crimes unless they are granted the right to the presence of counsel at all relevant disciplinary proceedings for the purpose of advising them as to their rights.

On April 17, 1975, petitioners herein filed a Notice of Appeal to the United States Court of Appeals for the First Circuit, from the judgment entered by the District Court on April 1, 1975. On May 5, 1975, the respondents, also filed a Notice of Appeal insofar as said judgment denied plaintiffs' relief.[1] The appeals have been consolidated. (Letters attached—App. C.) On June 27, 1975, the Court of Appeals, pursuant to a joint motion filed by the parties, entered an order staying and deferring consideration of these appeals and the requirements for filing briefs therein, pending disposition of this Petition. (App. D.)

Questions Presented

1. Whether a state prisoner is entitled under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution to the presence of counsel at prison disciplinary proceeding concerning an infraction which is also a crime.

2. Whether under the Fifth and Fourteenth Amendments to the United States Constitution, a state prisoner who is charged with intra-prison misconduct which is also a crime is entitled to use and derivative use immunity with respect to statements made at prison disciplinary hearing concerning said charges wherein an invocation of silence may be used against him.

[1] Respondents, plaintiffs below, relying *inter alia* on *Simmons* v. *United States*, 390 U.S. 377 (1968); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); and *Spevack* v. *Klein*, 385 U.S. 511 (1967), have continually asserted, as reflected by their cross-appeal in the First Circuit that the inherently coercive situation which a prisoner faces when confronting a disciplinary bound on charges which also constitute a crime warrants a grant of "use immunity" with respect to statements he makes in his defense at said hearing, irrespective of whether an invocation of silence may be held against him.

Reasons for Granting the Writ

I. Consideration of the Present Case Together With *Baxter* v. *Palmigiano* and *Enomoto* v. *Cluchette* Will Greatly Illuminate the Issues Presented Therein and Will Present the Court With a Much More Comprehensive View of These Important Questions.

This case presents closely related issues to those involved in *Baxter* v. *Palmigiano*, No. 74-1187, and *Enomoto* v. *Clutchette*, No. 74-1194 *certiorari granted*, June 9, 1975. These cases all present the questions of what procedures are required by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, at prison disciplinary proceedings, before prisoners can be punished for infractions which may also be the basis for criminal prosecutions. Essentially, the issues concern the right to counsel and "use immunity" at prison disciplinary hearings. While both *Enomoto* and *Baxter* raise some of the same issues, neither raises them as squarely and definitively as the present case. First, the present case is a class action, with a very complete and definitive record concerning all aspects of the questions involved. Second, the instant matter raises issues both as to the requirements of counsel under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and *Mathis* v. *United States*, 391 U.S. 1 (1968) in

light of *Wolff* v. *McDonnell,* 413 U.S. 598 (1974) as well as the requirements of "use immunity" under *Simmons,* v. *Lefkowitz* and *Garrity. Enomoto* does not raise the immunity question, and the holding of the First Circuit in *Baxter* is not quite as clear as to requirements of counsel. 510 F.2d at 536-37 (1975). In the instant case, the judgment below clearly mandates the presence of counsel for the purpose of advising the inmate as to his rights 390 F. Supp. at 709-10. Like the Court of Appeals in *Baxter II,* the district court in this case ignored the holdings of this Court in *Wolff* v. *McDonnell, supra* on the counsel issue and unnecessarily extended a right to "use immunity" contrary to the teaching of *McGautha* v. *California,* 402 U.S. 183 (1971). Third, only the present case raises facts and issues concerning the procedures required with respect to the discipline of prisoners who have already been arraigned for a crime. Thus, petitioners believe that consideration of the present case together with *Enomoto* and *Baxter* will greatly illuminate the issues therein and present the Court with a much more comprehensive view of these important questions.

For these reasons, petitioners believe it would be appropriate in this case for the Court to grant certiorari before judgment in the Court of Appeals — under Rule 20 of this Court's Rules — and decide *Enomoto, Baxter* and the instant cases together on a consolidated basis, *see, e.g. Bolling* v. *Sharpe,* 344 U.S. 873 (see discussion in *Brown* v. *Board of Education,* 344 U.S. 1, 3); *See also, Roe* v. *Wade,* 410 U.S. 113, 123 (1973); and particularly where *Baxter* and this case arose out of the same circuit. *See, e.g. Taylor* v. *McElroy,* 358 U.S. 918 (1954).

Conclusion

For all the above reasons, your petitioner prays that this Honorable Court grant this Writ of Certiorari di-

rected to the United States Court of Appeals for the First Circuit and that this Honorable Court establish a briefing schedule towards the ultimate determination of this case.

Respectfully submitted,

JULIUS C. MICHAELSON
Attorney General
RONALD A. DWIGHT
Special Assistant Attorney General
250 Benefit Street
Providence, Rhode Island 02903
(401) 831-6850

APPENDIX A

UNITED STATES DISTRICT COURT
D. RHODE ISLAND

Civ. A. No. 5075
Michael ROBERTS and Robert W. Flint, Jr.,
Individually and on behalf of all others similarly situated,
Plaintiffs,
v.
Donald C. TAYLOR, acting Director
Rhode Island Department of Corrections, and
James Mullen, Warden Adult Correctional Institutions,
Defendants.

Feb. 25, 1975

Ralph J. Gonnella, Cary J. Coen, Providence, R.I., for plaintiffs.

W. Slater Allen, Asst. Atty. Gen., State of Rhode Island, Providence, R.I., for defendants.

OPINION

DAY, District Judge.

This is a class action wherein the named plaintiffs, inmates at the Rhode Island State Adult Correctional Institutions (hereinafter the "A.C.I."), seek declaratory and injunctive relief to redress alleged violations of their constitutional rights by the defendants.[1] Additionally, the plaintiffs seek, on behalf of—

[1] The defendants herein are: (A) Donald C. Taylor, Acting Director, Rhode Island Department of Corrections; and (B) James Mullen, Warden, Adult Correctional Institutions. Mr. Taylor and Warden Mullen have automatically been substituted as party defendants pursuant to the provisions of Rule 25(d) of the Federal Rules of Civil Procedure.

> ". . . all adult persons incarcerated in the State of Rhode Island and who are in the custody and control of the Director of Corrections,"[2]

a court order prosecutively prohibiting any similar, alleged constitutional violations by the defendants.

It is the plaintiffs' contention that certain practices adhered to by the defendants during the regular course of prison disciplinary proceedings at the A.C.I. suffer from constitutional infirmities. Specifically, the plaintiffs aver that the defendants' conduct in denying inmates, who have been charged with violations of prison regulations, either the right to the services of counsel at prison disciplinary hearings called to determine the validity of such charges and/or the right to "use-immunity" so-called, at said prison disciplinary hearings, violates the plaintiffs' rights, and the rights of the members of the plaintiff class, as secured by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.[3]

The plaintiffs seek the following relief:

> "(A) A declaratory judgment that the actions of the defendants in refusing plaintiffs the assistance of counsel complained of herein violates plaintiffs' rights and the rights of members of the plaintiff class secured by the Sixth and Fourteenth Amendments to the United States Constitution.
>
> (B) A declaratory judgment that evidence and/or testimony (or evidence derived therefrom) produced at disciplinary hearings by plaintiffs or

[2] See Plaintiffs' amended complaint, paragraph 7, at p. 3.

[3] The plaintiffs have asserted that the defendants' denial of the right to counsel and/or of the right to "use immunity" in prison disciplinary hearings to inmates suspected of violating prison regulations is especially egregious where, as here, state criminal charges based upon the same alleged conduct have been filed against the plaintiff-inmates prior to the convening of said disciplinary hearings.

members of their class, may not be used in any subsequent Rhode Island State Criminal proceeding without violating the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; . . .

(D) That after an opportunity of the defendants to be heard this court preliminarily and permanently enjoin the defendants, their agents, attorneys and persons acting in concert with them from disciplining the above-named plaintiffs or their class when the disciplinary charges might also result in the filing of state criminal charges without first:

1. Providing plaintiffs and members of their class with an opportunity to obtain the services of an attorney to represent them at said disciplinary hearing."[4]

Prior to a consideration of the validity of the plaintiffs' aforementioned claims for relief, a brief recital of the pertinent facts herein involved must, in an effort to facilitate disposition of the precise issues before the Court, be set forth. Accordingly, an abbreviated statement of the facts presently before the Court follows immediately below.

I. Plaintiff Roberts

On December 3, 1972, plaintiff inmate Roberts was charged by officials at the A.C.I. with violation of prison disciplinary rules and regulations, that is, he was charged with possession of a hypodermic needle and syringe, assaulting a correctional officer and using abusive language to a correctional officer. Subsequent to an abbreviated, initial appearance before the A.C.I. prison disciplinary board, plaintiff Roberts was charged by the Rhode Island

[4] See plaintiffs' Amended Complaint, at pp. 7-8.

State Police with a violation of Rhode Island Criminal Laws, namely, possession of a hypodermic needle and syringe. Plaintiff Roberts entered a plea of not guilty at his arraignment in the Sixth Division District Court on December 12, 1972.

Plaintiff Roberts made a second, significantly longer, appearance before the A.C.I. prison disciplinary board on December 21, 1972. At this hearing Roberts requested permission to have legal counsel represent him before the disciplinary board. Additionally, he sought a grant of use and/or derivative use immunity concerning all testimony he might proffer at said hearing on the aforementioned charge of possession of a hypodermic needle and syringe. The prison disciplinary board denied both of these requests.[5]

Based on the evidence at said hearing, the disciplinary board found plaintiff Roberts guilty of all of the violations charged and sentenced him to 30 days in segregation.

II. Plaintiff Flint

On November 29, 1972, prison officials at the A.C.I. filed disciplinary charges against plaintiff Flint alleging that he had assaulted another inmate with a dangerous weapon with a specific intent to kill said inmate, and that he had assaulted two correctional officers with a dangerous weapon. In addition to the filing of the aforementioned intra-prison disciplinary complaint, plaintiff Flint was, on December 4, 1972, arraigned in the Sixth Division District Court, in Cranston, Rhode Island, on charges of assault with intent to kill said inmate, and assault with a dan-

[5] As a result of said denials, Roberts refused to testify in his own behalf. He did, however, participate in cross-examination of the witnesses testifying against him. Immediately prior to the culmination of the disciplinary hearing, Roberts informed the board members that had he been granted use and/or derivative use immunity, he would have presented exculpatory testimony in his own behalf.

gerous weapon on the aforementioned two correctional officers.[6] As was similarly true with plaintiff Roberts, the state criminal charges filed against plaintiff Flint arose out of the aforementioned alleged violations of prison regulations.

Plaintiff Flint made several appearances before the A.C.I. prison disciplinary board.[7] At each of said appearances plaintiff Flint requested, and was denied, both the opportunity to have the presence and assistance of legal counsel at said hearings and a grant of use-immunity concerning all testimony he migt proffer on the charges brought against him. As a result of said denials, plaintiff Flint refused to testify in his own behalf at the disciplinary hearings. On the basis of the evidence presented at said disciplinary hearings, plaintiff Flint was found guilty on all charges brought against him and was sentenced to 30 days segregation and 30 days loss of good time. Additionally, the disciplinary board recommended a downgrading of his inmate classification. *See* Trial Transcript, at pp. 42-43.

One final, and significant, factual circumstance must be noted. Each of the named plaintiffs herein involved was informed, prior to his request for use and/or derivative use immunity and prior to his subsequent refusal to testify in his own behalf, by the prison disciplinary board that—

> ". . . although statements you make in your defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, you may wish to consult an attorney to determine what action you wish to take . . ." *See* Trial Transcript, pp. 26, 60-61.

[6] Flint entered a plea of not guilty at his arraignment.

[7] Said disciplinary hearings occurred on December 5, 21 and 29, 1974.

It is apparent, therefore, that plaintiffs Roberts and Flint, both of whom had been charged with the commission of state crimes *prior* to the convening of the prison disciplinary board hearings in question, were aware that any testimony they might give in their own behalf at said prison disciplinary board hearings could possibly be used against them in their pending state criminal prosecutions.

With the above-noted circumstances in mind, consideration of the merits of the plaintiffs' claims follows immediately below.

I. Right to Counsel at Prison Disciplinary Hearings

[1] It is this Court's considered opinion that where, as here, prison inmates are charged with violations of prison regulations, and have, as a direct result of said alleged violations, been arraigned on charges of criminal behavior violative of state law,[8] said inmates are entitled to, and indeed, must be granted, the right to the presence of legal counsel during the course of the prison disciplinary hearings which are held to determine the validity of the intra-prison disciplinary charges. *See* Palmigiano v. Baxter, 510 F.2d 534, on consideration after remand (1st Cir. 1974); Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974); *cf.* Mathis v. U. S., 391 U.S. 1, 88 S. Ct. 1503, 20 L.Ed.2d 381 (1968); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). It must be noted, however, that this right to the presence of counsel neither includes nor contemplates active trial-like participation by said counsel at the disciplinary hearing. Inmates are entitled to the presence and assistance of counsel solely for the purposes of (1) receiving assistance in the prepara-

[8] This right to counsel accrues to inmates only so long as a state criminal prosecution for intra-prison offenses may be anticipated. See Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974); Palmigiano v. Baxter, 510 F.2d 534 at pp. 536-37, on consideration after remand (1st Cir. 1974).

tion of a case prior to the disciplinary hearing, and (2) receiving advice at said disciplinary hearing. *See* Miranda v. Arizona, *supra;* Mathis v. U.S., *supra; cf.* U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1966).

[2] Logic and reason dictate that accused inmates must, under circumstances such as those in the present case, be afforded the opportunity to have counsel present during pertinent hearings of prison disciplinary boards. A balance must be struck, however, to accommodate the realistic needs and practicalities of prison life. It is for this reason that an accused inmate's right to counsel at a prison disciplinary hearing takes on the posture of a right to the presence of a non-participating legal advisor. Any other conclusion would unnecessarily impede prison disciplinary boards in their hearings.

II. Right to Use and/or Derivative Use Immunity

[3, 4] It is a well settled general rule of law that an accused's invocation of his Fifth Amendment privilege against self-incrimination cannot, in and of itself, give rise to an inference of guilt as to the offenses charged. *See* Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Palmigiano v. Baxter, *supra* ("His silence may not be used against him at that time or in future proceedings . . ." 510 F.2d at 536); *cf.* Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973); Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). Where, as here, an inmate, who is subject to state criminal prosecution for alleged intra-prison misconduct, is called before a prison disciplinary board to answer charges that he has, in fact, engaged in such misconduct, and where said inmate has invoked his Fifth Amendment privilege to remain silent and said invocation will be, and is in reality, considered by prison au-

thorities as a factor relevant to the determination of the validity of the aforementioned charges of intra-prison misconduct,[9] said inmate is as of right entitled to a grant of use immunity. *See* Palmigiano v. Baxter, *supra* (". . . where an inmate is called to a disciplinary hearing under the circumstances present here, and is informed that his silence will be used against him, or indeed where his testimony is compelled, use immunity must be provided and the inmate must be so informed . . ." 510 F.2d at 536).

[5, 6] It must be noted, however, that an accused inmate is not entitled as of right to a grant of use immunity whenever he appears before a prison disciplinary board.[10] As previously mentioned, this Court's holding that the plaintiff-inmates herein involved should have been granted use immunity by the A.C.I. prison disciplinary board is premised on the existence of the following factors:

1. The plaintiff-inmates had, as a direct result of their alleged violation of prison regulations, been arraigned in Sixth Division District Court on charges of criminal behavior violative of state

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[9] See Trial Transcript, Testimony of Ex-Warden Howard, at pp. 84-87.

[10] The First Circuit placed its imprimatur on this precept when it noted in Palmigiano v. Baxter, *supra* at p. 536, that—

> "We now think that we were in error on two counts. In the first place, we too easily applied the right of an inmate to remain silent without his silence being used against him . . . to the situation in which no adverse inference is drawn from silence but in which the inmate must choose whether or not to testify to potentially self-incriminating matters in order to rebut or explain facts presented against him at the disciplinary hearing . . . Concededly, the prospect of future criminal prosecution places a prisoner before a disciplinary board in an awkward spot that could make the choice between speaking and remaining silent difficult. But . . . not every adverse consequence which flows from remaining silent can be characterized as an unconstitutional penalty upon the exercise of the privilege against self-incrimination."

law. Said arraignments occurred prior to the convening of the disciplinary board hearings in question; and

2. The plaintiff-inmates had invoked their Fifth Amendment privilege against self-incrimination at the disciplinary board hearings and said invocation was clearly viewed by prison officials as a factor relevant to the determination of the validity of the pending disciplinary charges of intra-prison misconduct.

[7] Accordingly, it is this Court's considered opinion that the named plaintiffs should have been afforded not only the right to the presence of counsel to advise them, but also use-immunity, at the prison disciplinary board hearings in question. Insofar as the record before the Court clearly indicates that the A.C.I. disciplinary board did not satisfy these two constitutional requirements, the findings and decisions relating to the alleged infractions in question rendered by said disciplinary board must be expunged from the plaintiff-inmates' in-prison records. Additionally, the decision of the prison board, insofar as it recommended downgrading in plaintiff Flint's classification must be, and it is, vacated.

[8] Moreover, it is this Court's determination that where state prison inmates, under circumstances such as those in the instant case, are denied (1) the right to the presence of counsel at prison disciplinary board hearings, and (2) the grant of "use-immunity" at said hearings said denials constitute a violation of the inmates' rights as secured by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Any evidence and/or testimony proffered by accused inmates at such constitutionally inadequate disciplinary board hearings cannot be employed by the State against said inmates in any subsequent state criminal proceeding.

The named plaintiffs have clearly established a necessity and propriety compelling the issuance of a court order permanently enjoining the defendants from meting out punishment to state prisoners, when intra-prison disciplinary charges might also result in the filing of state criminal charges, unless said inmates are granted the right to the presence of counsel at relevant prison disciplinary board hearings for the purpose of advising them as to their rights. Accordingly, the plaintiffs' prayer for the aforementioned permanent injunctive relief must be, and it is, granted. Counsel for the plaintiffs will prepare an appropriate order in conformity with this decision.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 5075
MICHAEL ROBERTS and ROBERT W. FLINT, JR.,
Individually and on behalf of all others similarly situated,
Plaintiffs,
v.
DONALD C. TAYLOR, ACTING DIRECTOR
RHODE ISLAND DEPARTMENT OF CORRECTIONS, AND
JAMES MULLEN, WARDEN
ADULT CORRECTIONAL INSTITUTIONS

JUDGMENT

This action came on for trial before the Court, and issues having been duly tried; decision having been duly rendered; and in accordance with the findings of fact and conclusions of law set forth in the Opinion filed on February 25, 1975, it is hereby:

ORDERED, ADJUDGED, AND DECREED,

1. Plaintiffs have properly brought this action on their own behalf and pursuant to Rules 23 (a) and (b) (1) and (b) (2) of the Federal Rules of Civil Procedure on behalf of all persons committed as adults to the custody and control of the Director of the Rhode Island Department of Corrections in that Plaintiffs' class is so numerous as to make joinder of all members impracticable; the policies and procedures challenged by the name Plaintiffs have been applied to numerous members of Plaintiffs' class and the claims of the named Plaintiffs are typical in common to all members of the class;

2. Pursuant to 28 U.S.C. § 2201, it is declared that insofar as the named Plaintiffs and members of their

class have been denied the assistance of counsel and a grant of use and derivative use immunity, and had the invocation of the privilege against self-incrimnation by them considered as a factor relevant to the determination of charges at a disciplinary proceeding wherein the alleged intra-prison misconduct might also be the basis for criminal prosecution, said proceedings violated the rights of Plaintiffs and members of their class as secured by the Fifth, Sixth, and Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution;

3. Pursuant to 28 U.S.C. § 2201, it is declared that with regard to any testimony and/or evidence given by Plaintiffs or members of their class at a disciplinary hearing conducted by Defendants wherein the alleged intra-prison misconduct might also be the basis for criminal prosecution and the invocation of the privilege against self-incrimination may be considered as a factor relevant to the determination of the disciplinary charges, the inmate proceeded against is in each case entitled to use and derivative use immunity to the extent that his testimony and/or evidence before the disciplinary board may not be used against him in any subsequent criminal prosecution without violating the Fifth and Fourteenth Amendments to the United States Constitution;

4. Defendants, their agents, successors, employees, attorneys, and persons acting in concert with them are permanently enjoined from disciplining and punishing the named Plaintiffs and members of their class with respect to disciplinary infractions which may also result in criminal prosecution unless the inmates involved are granted the right to the presence of counsel at any and all relevant prison disciplinary proceedings for the purpose of advising them as to their rights.

5. Defendants shall forthwith expunge from their in-

prison records, the findings of the Adult Correctional Institutions disciplinary board on December 5, 21, and 29, 1972, concerning Plaintiff Robert Flint and the findings of the Adult Correctional Institutions disciplinary board on December 21, 1972, concerning Plaintiff Michael Roberts.

6. Defendants shall notify all members of Plaintiffs' class in writing of the provisions of paragraph 2, 3, and 4 of this decree.

Per Order
(s) JACOB HAGOPIAN
Clerk

ENTER April 1, 1975
(s) EDWARD W. DAY
EDWARD W. DAY
United States District Judge

APPENDIX C

[Letterhead — WINOGRAD, SHINE & ZACKS]

June 4, 1975

The Honorable Dana Gallup, Clerk
United States Court of Appeals
For the First Circuit
1602 John W. McCormack
Post Office and Courthouse
Boston, MA 02109

Re: Michael Roberts et al.
Vs: Donald C. Taylor et al.
Nos. 75-1164, 75-1170

Dear Mr. Gallup:

Enclosed please find for filing and approval by the Court an original and four copies of a stipulation pursuant to which the parties have agreed that the above-entitled matters may be consolidated, and that defendants below shall proceed as appellants and that a joint appeal may be filed for use and reference in both cases.

Very truly yours,
WINOGRAD, SHINE & ZACKS
CARY J. COEN

CJC/cd
Enclosures
cc: Ronald A. Dwight, Esq.
Ralph Gonnella, Esq.

[Letterhead — OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

June 5, 1975

To Counsel:

No. 75-1164. Roberts et al v. Taylor et al.
No. 75-1170. Roberts et al v. Taylor et al.

Dear Sirs:

The Court has today approved the stipulation dated June 4, 1975.

It is noted that no statement of issues or designated of contents of appendix has been filed. They were due on May 19, 1975. It is further assumed that defendant, appellant will file their brief on schedule, i.e., June 13, 1975.

Sincerely yours,
(s) DANA H. GALLUP
Clerk

DHG/jmo
Ronald A. Dwight, Esquire
Special Assistant Attorney General
250 Benefit Street
Providence, Rhode Island 02903

Cary J. Coen, Esquire
915 Hospital Trust Building
Providence, Rhode Island 02903

Ralph J. Gonnella, Esquire
808 Union Trust Building
Providence, Rhode Island 02903

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1164

MICHAEL ROBERTS, ET AL.,
Plaintiffs, Appellees,
v.
DONALD C. TAYLOR, ET AL.,
Defendants, Appellants.

No. 75-1170

MICHAEL ROBERTS, ET AL.,
Plaintiffs, Appellants,
v.
DONALD C. TAYLOR, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered June 27, 1975

Upon consideration of joint motion to stay and defer consideration of appeals,

It is ordered that said motion be, and the same hereby is, granted until further order of this Court.

By the Court:
(s) DANA H. GALLUP
Clerk

[cc: Messrs. Dwight, Coen and Gonnella.]